

REMARKS/ARGUMENTS

Claims 1-31 remain in the application, all of which stand rejected.

1. The Rejection of Claims 1-31 Under 35 USC 103(a)

Claims 1-31 stand rejected under 35 USC 103(a) as being unpatentable over Lumelsky et al. (U.S. Pat. No. 6,516,350; hereinafter "Lumelsky") in view of Forecast et al. (U.S. Pat. No. 6,230,200; hereinafter "Forecast").

With respect to applicants' claim 1, the Examiner asserts that:

4. As to claim 1, Lumelsky teaches. . .

... automatically activating said reserve resource when dictated by said resource usage policy (col. 8, line 48 – col. 9, line 38).

However, Lumelsky does not explicitly teach said reserve resource is [a] hardware component.

Forest [sic, Forecast] teaches one or more of stream servers are kept in a standby mode, and they are being used as hot spares for any one of the other stream servers that fails to acknowledge commands from controller servers (col. 9 lines 6-36).

It would have been obvious to one of ordinary skill in the Data Processing art at the time of the invention to combine the teachings of Lumelsky and Forecast to activate said standby stream servers that include hardware components such as processor and memory when said other stream servers fails to timely acknowledge commands because it would improve system performance.

4/19/2005 Final Office Action, pp. 2-3, sec. 4.

Applicants agree that Lumelsky fails to teach the automatic activation of a "reserve hardware component". However, applicants do not agree that this is taught by Forecast.

Lumelsky teaches the replication of requested content from one server to another when "there are no more sufficient available resources on all the servers managed by the system". See, Lumelsky, col. 8, lines 48-49. And, as the Examiner correctly alludes, Forecast teaches the activation of a spare stream server when "any

one of the other stream servers. . . fails to acknowledge commands from the active one of the controller servers 28, 29 or is otherwise found to experience a failure.” See, Forecast, col. 9, lines 33-36. The triggers that cause Lumelsky and Forecast to take action are therefore different. That is, while Lumelsky begins to replicate content to a new server when there “are no more sufficient available resources on all the servers managed by the system”, Forecast activates a spare stream server when it is determined that an already active server has failed. Forecast does not provide any indication that an additional stream server should be activated in the absence of failure, but in response to an increased load.

Given that Lumelsky and Forecast replicate content to, or activate, servers in response to different triggers, applicants believe there would not have been any motivation for one of ordinary skill in the art to combine Lumelsky’s and Forecast’s teachings at the time of applicants’ invention.

In the absence of either Lumelsky or Forecast containing a motivation to combine their teachings, applicants believe the Examiner is engaging in a hindsight reconstruction of their invention. That is, the Examiner apparently located the Forecast reference by searching for keywords found in applicants’ claim (e.g., “monitoring”, “activating”, “threshold”), and not by searching for solutions to a common problem (e.g., what to do when a load exceeds a threshold). While the former may be a useful in locating references that *might* have a relation, the Examiner cannot stop upon finding all of the bits and pieces of applicants’ claims in other patent references. Instead, the Examiner must go a step further and review the references from the vantage point of “one of ordinary skill in the art at the time applicants’ invention was made”. A determination can then be made as to whether such a person would have found it obvious to combine the teachings of the references. Without performing this last step, the Examiner has simply engaged in impermissible hindsight reconstruction.

Applicants believe their claim 1 should be allowed for at least the above reasons. However, even assuming, *arguendo*, that the teachings of Lumelsky and Forecast can be properly combined, applicants do not believe that the combined teachings of these references yields the invention of their claim 1.

The Examiner asserts that Forecast can be construed as teaching the automatic activation of a reserve hardware component because the activation of a hot spare stream server would necessarily include the activation of a plurality of "hardware components such as processor and memory". See, 4/19/2005 Final Office Action, p. 3, sec. 4. However, in attempting to draw this correlation, the Examiner is misconstruing and glossing over the decision that is being made in applicants' claim 1. That is, applicants' claim 1 activates a reserve "hardware component". Although the activation of enough hardware components might eventually result in the activation of a "server", the decision being made in applicants' claim 1 is more granular than the activation of a "server". As a result, applicants believe that, even if it were proper to combine the teachings of Lumelsky and Forecast (which it is not), their combined teachings would not result in a method that performs the action of "automatically activating a reserve *hardware component* when dictated by [a] resource usage policy." See, applicants' claim 1. Of note, Forecast itself provides a distinction between "servers" and "components". See, e.g., col. 1, lines 53-55, wherein Forecast states:

. . .The actual level of resources available at any given time may depend on a specific configuration of *components* within the file *server*. . .

(Emphasis added).

Applicants' claim 1 is believed to be allowable at least for the above reasons. Applicants' claims 2-10 and 22-26 are believed to be allowable at least for the reason that they depend from applicants' claim 1. Applicants' claims 11-21 and 27-31 are believed to be allowable at least for reasons similar to why applicants' claim 1 is believed to be allowable.

Although all of applicants' claims are not discussed herein, many of applicants' claims are also believed to be allowable for other reasons.

With respect to applicants' claims 23, 25, 28 and 30, applicants disagree with the Examiner's assertion that 1) Forecast's activation of an entire "standby" server that includes a hardware component is equivalent to 2) applicants' activation of a "component of an active server resource." Given that Forecast does not teach the

activation of a "hardware component", the Examiner's position would require construing Forecast's "standby" server as an "active server resource". However, this would result in Forecast "activating" an "active server resource", which is nonsensical. The Examiner's attempt to read applicants' claims 23, 25, 28 and 30 on Lumelsky's and Forecast's combined teachings must therefore fail; and applicants' claims 23, 25, 28 and 30 should be allowed over the combined teachings of Lumelsky and Forecast for this additional reason.

With respect to applicants' claims 26 and 31, applicants can find no teaching by Lumelsky that the "threshold" specified in a resource usage policy is a "rate of active resource consumption". Although the Examiner asserts that this is taught by Lumelsky in col. 12, lines 26-52, applicants have reviewed this excerpt in detail and have found absolutely no mention of such a threshold. Applicants' claims 26 and 31 are therefore believed to be additionally allowable over the combined teachings of Lumelsky and Forecast.

Applicants note that the Examiner has not provided a detailed rejection of their claim 13. Instead, the Examiner has merely rejected claim 13 as having "similar limitations" as claim 1. See, 4/19/2005 Final Office Action, p. 5, sec. 15. Although some of claim 13's limitations are similar to those of claim 1, claim 13 recites limitations that are not set forth in claim 1. For example, and as noted in applicants' previous Amendment, claim 13 recites that resource activation is "based on a hierarchical resource deployment scheme". Lumelsky teaches no such hierarchy of resources to be deployed. Rather, Lumelsky merely replicates content to a set of resources that are capable of supporting the replicated content. Claim 13 is therefore believed to be allowable for this reason, in addition to the reason that it depends from claim 1.

2. Conclusion

Given the above Remarks, applicants respectfully request the timely issuance of a Notice of Allowance.

Respectfully submitted,
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